IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES	:	
	:	
v.	:	**CRIMINAL NO. 04-CR-611-3**
	:	
JOHN CHRISTMAS	:	

MEMORANDUM AND ORDER

Kauffman, J. **April 15, 2005**

Defendant John Christmas ("Defendant") is charged in a Superceding Indictment with conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 371 and 1341 (Count Three); mail fraud, in violation of 18 U.S.C. § 1341 (Counts Four through Six); perjury, in violation of 18 U.S.C. § 1623 (Counts Forty-Six and Forty-Eight); and false statements to the Federal Bureau of Investigation, in violation of 18 U.S.C. § 1001 (Count Forty-Seven). Presently before the Court is Defendant's Motion to Dismiss Counts Forty-Six and Forty-Eight of the Superceding Indictment. For the reasons stated below, the Motion will be denied.[1]

I. Legal Standard

The Federal Rules of Criminal Procedure require that an indictment be a plain, concise and definite written statement of the essential facts constituting the offense. Fed. R. Crim. P. 7(c)(1). An indictment is sufficient if it includes the elements of the offenses charged, apprises the defendant of what he or she must be prepared to defend against at trial, and enables the defendant to show with accuracy to what extent he or she may plead an acquittal or conviction as

[1] All references to the Indictment refer to the Superceding Indictment issued on February 2, 2005.

a bar to subsequent prosecutions. See Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Galati, 853 F. Supp. 152, 154 (E.D. Pa. 1994). "[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989). In deciding a pretrial motion to dismiss an indictment, a court should not consider the sufficiency of the government's evidence. See United States v. DeLaurentis, 230 F.3d 659, 660 (3d Cir. 2000); Galati, 853 F. Supp. at 154. Instead, a court must accept as true all facts properly pled in the indictment and may grant the motion only where the allegations in the indictment are insufficient to sustain a conviction for the offenses with which defendant is charged. See United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990); United States v. Hedaithy, 392 F.3d 580, 589 (3d Cir. 2004).

II. Analysis

In order to prove perjury under 18 U.S.C. § 1623, the government must establish that a witness testifying under oath or affirmation has given false testimony concerning a material matter, with the willful intent to provide false testimony. See, e.g., United States v. Dunnigan, 507 U.S. 87, 95 (1993). It is well established that a perjury conviction can only be based on a "willful" material falsehood, and not on inaccurate testimony stemming from confusion, mistake, or a faulty memory. Id. Moreover, merely unresponsive answers, especially when the statements provided are literally true, will not sustain a perjury conviction. See Bronston v. United States, 409 U.S. 352, 358-59 (1973).

In the Indictment, Defendant is charged with two counts of perjury stemming from grand jury testimony given on or about December 3, 2003. Indictment at 113-15, 118-21. The

Indictment properly sets out the allegedly false statements made by Defendant as part of that testimony and tracks the language of the perjury statute. Id. In Count Forty-Six, the government alleges that Defendant's testimony that he could not recall having spoken with co-defendant Shamsud-din Ali on multiple occasions during the period of July 2001 through March 2002 regarding the Bowman Properties, Ltd. tax delinquency matter was false because Defendant "knew that he had spoken with Shamsud-din Ali" during that time period about the issue. Indictment at 115. Similarly, Count Forty-Eight charges that Defendant falsely testified before the grand jury that he could not recall having told Defendant Shamsud-din Ali that he had "broad discretion to, you know, do whatever I could for Keystone" during a telephone conversation in October 2001, when in fact Defendant at that time knew that he had made such a statement. Indictment at 121.

Defendant argues that these Counts should be dismissed for two reasons: first, he argues that the statements have been taken out of context; second, he claims that his testimony was simply that he could not recall the relevant events or statements. However, contrary to Defendant's assertion, this is not a situation where the questions were vague or Defendant's statements were taken out of context. Cf. United States v. Serafini, 167 F.3d 812, 819-20 (3d Cir. 1999). The included grand jury testimony related to each Count reflects that Defendant was repeatedly and pointedly asked if he recalled certain specific events and that he repeatedly testified that he did not. See Indictment at 114-15, 119-21. In addition, Defendant is not being charged merely on the basis of faulty memory or mistake. Cf. Dunnigan, 507 U.S. at 95. The government's specific allegation is that Defendant testified he could not recall making certain statements, when in fact he could recall them, and the Indictment alleges limited circumstantial

evidence to support this charge. Thus, the Indictment sufficiently charges perjury. See United States v. Tonelli, 577 F.2d 194, 200 (3d Cir. 1978) (stating that perjury indictment must detail the precise falsehood and the alleged factual basis of the falsehood); see also United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir. 1975) (finding that defendant may be liable for perjury based on statement that he did not recall a certain event, and that government may make its case with circumstantial evidence); United States v. Abrams, 568 F.2d 411, 419 (5th Cir. 1978). While this Court is skeptical of the government's ability to prove that Defendant did in fact recall these events at the time of his grand jury testimony, that is an issue of evidentiary sufficiency, and a pretrial motion to dismiss the indictment is "not a permissible vehicle for addressing the sufficiency of the government's evidence." DeLaurentis, 230 F.3d at 660. Instead, these issues are best reserved for a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a). Id. at 660-61.

III. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss Counts Forty-Six and Forty-Eight of the Superceding Indictment will be denied. An appropriate Order follows.

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ORDER

AND NOW, this 15th day of April, 2005, upon consideration of Defendant's Motion to Dismiss Counts Forty-Six and Forty-Eight of the Superceding Indictment (docket no. 73), and the government's Response thereto, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.